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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 892

THOMAS J. BUTTARS, SR.,

Petitioner,

vs.

UTAH MORTGAGE LOAN CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On August 4, 1938, the Utah Mortgage Loan Corporation, hereinafter called the respondent, filed a mortgage foreclosure proceeding against Thomas J. Buttars, Sr., hereinafter called the petitioner, in the proper State Court in Utah, seeking foreclosure of a mortgage on the real property here in question. Judgment was entered December 24, 1938, and, on January 30, 1939, the real property in question was sold by the Sheriff of Cache County, Utah, to respondent under due and legal order of sale duly issued by the said State Court in said foreclosure proceedings.

Under the law of the State of Utah, the debtor has six months' time within which to redeem property from sale under foreclosure proceedings and, in the event of failure to redeem, the sale becomes absolute upon the expiration of said six months' period and the purchaser at the sheriff's sale is entitled to a sheriff's deed as a matter of right without the necessity of any confirmation or other action by the court. The period of redemption commences to run from the date of such sale.

On July 13, 1939, the petitioner filed his petition in the District Court of the United States for the District of Utah seeking benefits under Section 75 (a to r, inclusive) of the Bankruptcy Act as amended, 11 U. S. C. A. 203. At the time of the filing of his petition, the period of redemption of said property had run except for sixteen days. (R. 23.) The first meeting of creditors was held by the conciliator on August 14, 1939. (R. 9.) No confirmation or application for a confirmation of any proposition of compromise or extension was filed or applied for by the petitioner during such proceedings; however, on October 13, 1939, the petitioner, by written petition sworn to before a notary public under oath duly taken thereon, stated that negotiations between himself and creditors for a composition and extension had been unsuccessful and that he had failed to obtain the acceptance of a majority in number and amount thereof. (R. 13.)

On October 9, 1939, upon proper service of notice of order to show cause upon the petitioner and his attorneys and hearing had in the premises based upon a petitoin filed by the petitioner on July 27, 1939, the District Court entered its order, whereby the court retained jurisdiction of the real estate covered by the mortgage for a period of sixty days from August 26, 1939, and authorized the petitioner during this period to redeem the property from said

sale upon the payment to respondent of the sum of $5,574.25, with interest, and releasing and discharging the property from the jurisdiction of the court in event of the failure of the petitioner to so redeem and authorizing and directing the Sheriff of Cache County, State of Utah, to issue to the respondent his sheriff's deed to the premises. (R. 10-11-12.) No objection was made to this order and the court ordered the attorneys for the respective parties to collaborate in an order satisfactory to both parties. (R. 10.) While a stenographic transcript is not available, it is the recollection of counsel that the order was actually concurred in and made at the request of counsel for petitioner. The petitioner failed to redeem the property as provided in the order or otherwise.

No objection to nor any appeal or other proceeding for review has been taken to said order of October 9, 1939. In accordance with the order, the Sheriff of Cache County issued his sheriff's deed on November 27, 1939, to respondent (R. 22) and caused the same to be filed in the County Recorder's Office in that county on the same date.

On November 27, 1939, one hundred three days after the first meeting of creditors and forty-five days after his taking oath before a notary public that he was unable to negotiate a composition in settlement of his debts, the petitioner filed his petition with the District Court under Section 75 (s) of the Bankruptcy Law as amended, the filing of which was never made known to or served upon the respondent or any of its attorneys and did not come to their attention until on or about March 26, 1940. On that day, respondent filed its verified petition with the District Court praying that the property and every part thereof be stricken from the inventory, appraisement and order fixing rentals and, further, praying for a judicial declaration to the effect that the petitioner and all persons claiming under, by or through him be declared to have no right, title or interest in

the property and asking for the exclusive possession thereof to be determined in the respondent and, by amended petition subsequently filed, asked that the entire proceedings under Section 75 (s) be dismissed for failure on the part of the petitioner to comply with Rule 50, Subsection 4, General Orders in Bankruptcy, promulgated by the Supreme Court of the United States and the rules and practice of the District Court of the United States for the District of Utah. (R. 14; R. 33.) In pursuance to said petition and amended petition and after hearing duly had thereon, the District Court made and entered its order on April 8, 1940, declaring that the period of redemption under the laws of the State of Utah from said sheriff's sale had expired prior to the filing of petitioner's amended petition under Section 75 (s); that respondent was the owner of and entitled to the exclusive possession of said real property; that the District Court had no jurisdiction thereof and further striking the property involved from the petitioner's schedules. (R. 22-23-24-25.)

The petitioner appealed to the Circuit Court of Appeals for the Tenth Circuit from the order of *April 8, 1940*, the notice of appeal specifically stating that the appeal was from "the judgment made and entered * * * on the 8th day of April, 1940." (R. 25.) The notice of appeal made no reference to the order of October 9, 1939, discharging the property from the jurisdiction of the court and, as stated, no proceedings either in the District Court or the Circuit Court of Appeals have been taken by the petitioner for a review of said order of October 9, 1939.

The Circuit Court sustained the judgment of the District Court on two grounds; first, on the ground that the District Court had jurisdiction of the parties and of the subject matter at the time of the making of its order of October 9, 1939, and that even though said order may have

been erroneous, it was not void and, as no appeal was taken from the order, its correctness could not be challenged collaterally on appeal from the order of April 8, 1940, and that when petitioner failed to comply with the provisions of that order, his right to redeem expired with the end of the sixty-day period and he had no further rights of redemption or interest in the property. (R. 43.) The second ground for sustaining the judgment of the District Court was that Subsection (n) of the Bankruptcy Act provides that where at the time of filing of a petition under Section 75 the period of redemption has not expired it shall be extended for the period reasonably necessary for the purpose of carrying out the provisions of the act, that is, to afford the debtor an opportunity to work out a composition or extension of his debts with his creditors, and that if a composition or extension is not procured within a reasonable time the stay terminates and the period of redemption again begins to run; that by the petitioner's own written oath before a notary public on October 13, 1939, the petitioner stated that he had made a bona fide offer of composition and extension to his creditors and had conducted negotiations for the composition and settlement of his debts and that his negotiations were unsuccessful; that he had failed to obtain an acceptance of a plan, was aggrieved thereby and desired to obtain the benefits of Subsection (s). On these facts and the construction of Section 75 (n), the court held that the automatic stay provided in said Subsection (n) terminated on October 13, 1939, and the period of redemption of the remaining sixteen days again began to run and had completely expired prior to the 27th day of November, 1939, and that petitioner, therefore, had no remaining interest in the property when he filed his amended petition. (R. 44.)

(We respectfully call to the court's attention a typographical error appearing on Page 1 of petitioner's petition

for writ of certiorari. Therein it is stated that Schedule A shows secured debts aggregating $1359.24. This should read, according to our computation, $13,579.24.)

ARGUMENT

Petitioner states six claimed reasons why certiorari should be granted. We will reply to said reasons in the order they are set forth.

(1) The Decision of the Circuit Court of Appeals is Contrary to the Plain Provisions of Section 75 of the Bankruptcy Act.

In support of this reason, petitioner has not specified in what manner or in what way he claims the decision to be contrary to the provisions of the Act, nor has he cited any adjudicated case so showing and there is, therefore, nothing set forth to be answered by respondent.

(2) The Decision of the Circuit Court of Appeals is not in Accord with the Applicable Decisions of This Court.

Petitioner has cited two cases to support this contention, Kalb vs. Feuerstein, 308 U. S. 433, 84 L. Ed. 370, and John Hancock Mutual Life Insurance Company vs. Bartels, 308 U. S. 180, 84 L. Ed. 176. We respectfully submit that neither of the cases in any manner support petitioner's contention.

The issues determined by the Circuit Court in the case at bar were not before this Honorable Court for determination in the Kalb vs. Feuerstein case. The only issue before the court involved the jurisdiction of the Wisconsin State County Court to entertain a foreclosure proceeding against a debtor during the pendency of proceedings under Section 75 (a to r) without the consent of the Bankruptcy Court in which the farmer's petition was then pending. This Hon-

orable Court properly held that the Bankruptcy Court had sole jurisdiction over the property and that the Wisconsin State Court had no jurisdiction whatsoever to entertain the foreclosure proceeding without such consent of the Bankruptcy Court, Justice Black on Page 440 of the Supreme Court report of the case stating:

> "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants *without the consent after hearing of the Bankruptcy Court* in which the farmer's petition was then pending. (Italics ours.)

The sheriff's deed issued in the case at bar to respondent was issued after hearing and upon the express order and direction of the District Court in the bankruptcy proceedings. The decision of the Tenth Circuit in the instant case, therefore, is not in any manner in conflict with that decision.

In the case of John Hancock Mutual Life Insurance Company vs. Bartels, this court again was not called upon to pass upon any of the questions determined by the Circuit Court in the instant case. The question presented in that case and decided by this Honorable Court was that it is not necessary that a debtor present a feasible plan for a composition and extension of his debts or that his plan contain any reasonable hope or expectation of working out his debts; that it is sufficient if he, in fact, wishes to attempt to seek an agreement with his creditors and he may do so regardless of the feasibility of his plan and, in failing to do so, he may ask for the other relief afforded by Subsection (s). None of these rights were taken from the petitioner in the case at bar. Further, an appeal was made by the debtor in the Bartels case from the order granting

the motion to set aside all proceedings under Subsection (s) and dismissing the cause, direct to the Circuit Court of Appeals for the Fifth Circuit, whose decision was reviewed by this court. In the case at bar, the petitioner failed to take any action with reference to a review of the order of October 9, 1939, which became final and unassailable from collateral attack upon failure to appeal therefrom as held by this court in the case of Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773, decided April 22, 1940, and Bowman v. Lopereno, 61 S. Ct. 201, decided December 9, 1940.

The decision of the Circuit Court of Appeals rather than being contrary to any decisions of this court is strictly in accord with the applicable decisions. The Circuit Court held that the District Court had jurisdiction of the parties and of the subject matter; that the order of October 9, 1939, was not void, but only erroneous; that no appeal was taken from the order and that, therefore, its correctness could not be challenged collaterally on appeal from the order of April 8, 1940, and that the order of October 9, 1939, became effective and binding upon the debtor upon his failure to appeal therefrom; that when he failed to comply with the provisions of the order his right to redeem expired at the end of the sixty-day period and that he had no further rights of redemption or interest in the property. This is strictly in accord with the decision of this court in Union Joint Stock Land Bank of Detroit vs. Byerly, supra. On Page 776 of the Supreme Court Reporter of the case, this court states:

> "In view of the provisions of subsection o, it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale. But the Court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have

been corrected by appeal from its order. The State Court and its officer, the Sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State Court.

"(3) Second. The termination of the bankruptcy proceeding restored the jurisdiction and power of the State Court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court."

And with the decision of this court in Bowmen vs. Lopereno, supra, where this court at Page 203 of the Supreme Court report of said case states:

"(2) These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

In support of the rule of law expounded therein that the filing of an untimely petition for rehearing which is not entertained or considered on its merits or a motion for leave to file such a petition out of time, if not acted upon or if denied by the trial court, cannot operate to extend the time for appeal, the court cites the following cases out of this

court:

> Morse vs. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518, and Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557.

In the case at bar, petitioner has not at any time filed or attempted to file a petition for rehearing of the order of October 9, 1939, nor has he taken any steps toward the correcting of said order in the event it was erroneous by appeal or otherwise; so, has taken no steps whatsoever that could under any of the adjudicated cases be considered as extending the time for appeal or review.

(3) The Decision of the Circuit Court of Appeals is in Conflict with a Decision of Circuit Court of Appeals of the Sixth Circuit.

In support of this contention, petitioner cites Schirever vs. Oxford Building and Loan Association, 116 Fed. (2d) 683. The facts and law as expounded in the Schirever case likewise do not sustain petitioner's contention. In the first place, in that case, a direct appeal was taken by the debtor from the order granting permission to continue antecedent foreclosure proceedings. The order below was made by the court on the theory that the debtor had no reasonable probability of financial rehabilitation. The law of the case, therefore, was controlled by the decision of this Honorable Court in the case of John Hancock Mutual Life Insurance Company vs. Bartels, supra, wherein it was held that the lack of probability of financial rehabilitation was not grounds for dismissal of the debtor's proceedings. Further, the order in the Shirever case was made after the debtor had filed his petition for adjudication under Section 75 (s), while in the case at bar the order attempted to be attacked by petitioner releasing the property from the jur-

isdiction of the court was made October 9, 1939, prior to the filing of his petition under Section 75 (s).

Further, a later case out of the Sixth Circuit Court of Appeals, Chapman vs. Federal Land Bank of Louisville, Kentucky, 117 Fed. (2d) 321, decided January 14, 1941, one week later than the Schirever case, supports the decision of the Tenth Circuit in the instant case. We quote from Page 323 of the report of the case.

> "But with respect to case No. 8720, appellees insist that the appeal should be dismissed for the reason that appellants failed to comply with the requirements of section 25, sub. a, of the Bankruptcy Act, 11 U. S. C. A., Section 48, sub. a, which provides: 'Appeals under this title to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.'
>
> "No appeal was taken within the time stipulated in the statute from the final order of July 29, 1939, dismissing the cause; and the petition to rehear was not filed until February 28, 1940. Appellees say, therefore, that an appeal does not lie from the order entered June 19, 1940, denying the petition to rehear, filed seven months after entry of the order of dismissal.
>
> "* * *
>
> "The true test has been stated clearly by the Supreme Court in a very recent case, Bowman v. Lopereno, 61 S. Ct. 201, 203, 85 L. E. ....., decided December 9, 1940: 'The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a pe-

> tion out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. (Citing Morse v. United States, 270 U. S. 151, 153, 154, 46 S. Ct. 241, 70 L. Ed. 518; Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557.) But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.' (Citing cases.)"

In the Chapman case, an early motion was made by two mortgage creditors to dismiss proceedings under Section 75 (a to r) and to authorize foreclosure in the State Court. A few days after the motions were filed, the debtor's petitions were amended to seek benefits under Section 75 (s) of the Act. The District Judge ordered that action on the petition for adjudication under Section 75 (s) be stayed pending decisions on the motions to dismiss. On July 29, 1939, the Judge entered an order overruling objections of the farmer-debtors and discharging the mortgaged property from the jurisdiction of the court and authorizing the creditors to foreclose upon their liens in the State Court. No steps were taken for review of this order by one of the debtors until February 28, 1940, when he filed in the District Court a petition for rehearing based upon recent decisions of this court involving the Bankruptcy Act. The Circuit Court held that manifestly the District Court erred in dismissing the cases under the authority of the Bartels case and other Supreme Court cases, but likewise, as above set forth, held that even though the court erred in dismissing the petition, the appeal would not lie by reason of the failure of the debtors to take proper steps for review of the order. The case is clear authority for the position taken by the Circuit Court in the case at bar.

(4) The Decision of the Circuit Court of Appeals is in

Conflict with a Decision of the Circuit Court of Appeals of the Seventh Circuit.

In support of this reason, petitioner cites Kalb vs. Feuerstein, 116 Fed. (2d) 775.

In the Feuerstein case, after the decision of this Honorable Court upon the appeal from the decision of the Wisconsin Supreme Court, the debtor filed a motion for reinstatement of the proceedings dismissed March 16, 1936, in the United States District Court and, upon the failure of the District Court to reinstate the cause, appealed to the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court held that the District Court committed no error in denying the motion for reinstatement of his petition. Its decision was primarily based upon the fact that the debtor had failed to proceed seasonably to comply with the requirements of Subsection (s) in failing to file his petition under Subsection (s). This is precisely the holding of the Circut Court of Appeals in the case at bar in its holding that the petitioner failed to file his petition under Section 75 (s) within a reasonable time after the petitioner by his own written oath admitted that the period necessary for the purpose of carrying out the provisions of the section had terminated on October 13, 1939, and having failed to file his petition for relief under Subsection (s) until forty-five days thereafter. The Kalb case further supports the Circuit Court's ruling in the instant case with reference to the failure of the debtor to timely appeal from the order of October 9, 1939. The court states at Page 779 of the opinion:

> "Appellees have contended that the appeal should be dismissed as it was not taken in proper time from the order of March 17, 1936, dismissing appellant's petition, and that the order of April 16, 1940, also appealed from, was merely a review of the former order, and, therefore, no appeal could prop-

> erly be taken from it. We think there is merit in the contention, but we prefer to decide the case on other grounds and find it unnecessary to decide the somewhat technical argument presented by appellees in this respect."

In the case at bar petitioner has at no time even requested the District Court to reconsider its order of October 9, 1939, and, therefore, not even the technicality raised in the argument in the Kalb case is presented, as at least in that case the debtor did move for reinstatement or reconsideration of the former order. The case, therefore, is entirely consistent with and supports the decision of the Tenth Circuit in the case at bar.

Petitioner, therefore, has not cited any case either out of this Honorable Court or any Circuit Court of Appeals creating any conflict with the decision of the Circuit Court in the case at bar, and, as hereinabove set forth, the decision is entirely consistent with all cases hereinabove cited by respondent and petitioner. In addition, the following Circuit Courts have sustained the position of the Tenth Circuit in this case.

> The Ninth Circuit in the case of McFarland vs. West Coast Life Insurance Company, 112 Fed. (2d) 567, decided June 5, 1940.
>
> The Eighth Circuit in the case of United States vs. Dowell, 82 Fed. (2d) 3.
>
> The Seventh Circuit in re Stearns and White Company, 295 Fed. 833.

The other two reasons given by petitioner for the granting of certiorari are general grounds not supported by any cases or argument. The fifth reason that the Circuit Court of Appeals has decided an important question of law which should be finally settled by this court is not applicable.

As herein conclusively established, all questions of Federal Law involved in this proceeding have been settled by this court.

Petitioner does not state in what manner he claims the Circuit Court of Appeals has sanctioned a departure from the statutes and opinions of this court whereby it is imperative that this court exercise its power of supervision; in fact, all of the cases referred to herein and by petitioner conclusively show that the decision of the Tenth Circuit in the case at bar is strictly in accordance with law.

Petitioner on Page 10 of his brief makes the general statement that the lower courts entered judgment contrary to the express provision of the statute and contrary to the decisions of this court and then cites as so holding John Hancock Mutual Life Insurance Company vs. Bartels, supra,; Kalb vs. Feuerstein, supra,; Union Joint Stock Land Bank of Detroit vs. Byerly, supra; Borchard vs. California Bank, 310 U. S. 311, 84 L. Ed. 1223, and Wright vs. Union Central Life Insurance Company, 61 U. S. 196, 85 L. Ed. 166. The first three cases cited have been heretofore reviewed. The last two cases cited are not in point.

In the Borchard case, a direct appeal was taken by the debtor from the order granting the California Bank the right to proceed with foreclosure proceedings. This court in that case merely held that it was error under the facts there existing to permit the foreclosure.

In the case of Wright vs. Union Central Life Insurance Company, the debtor again appealed directly from an order directing the sale of the debtor's farm and the only question presented to this court was whether under Section 75 (s) (3) the debtor must be accorded an opportunity on his request to redeem the property at the reappraised value or at a value fixed by the court before the court may order

a public sale. The facts in that case were not similar in any respect to the facts in the instant case.

We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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